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Nos. 08-1498, 09-89

IN THE

Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,
Petitioners,

v.

HUMANITARIAN LAW PROJECT, *et al.*,
Respondents.

HUMANITARIAN LAW PROJECT, *et al.*,
Cross-Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* SCHOLARS, ATTORNEYS, AND FORMER PUBLIC OFFICIALS WITH EXPERIENCE IN TERRORISM-RELATED ISSUES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Amici "Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues" submit this brief in support of petitioners Eric Holder, et al.[1] *Amici* have wide-ranging experience in the matters at issue in this case. Participants include scholars who have written prominent articles and books on national security matters in general and terrorism-related criminal law in particular. These scholars also have hands-on experience in the field. One participant, Prof. Peter Raven-Hansen, is co-author of the leading casebook on national security law, and also serves as co-counsel for victims of terrorism seeking damages against alleged financiers of terrorism under the Anti-Terrorism Act, 18 U.S.C. § 2333(a). Another, Prof. Robert Chesney of the University of Texas, has served as an advisor to the current administration's Detention Policy Task Force, and has written extensively about the origins and post-9/11 applications of the statute at issue here.

Amici also include former government officials from an array of government agencies, including the Departments of State, Defense, and Justice. A number of *amici* have prosecuted terrorism cases in federal court. See, *e.g.*, *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000) (per curiam) (noting Paul W. Butler's appearance as Assistant United States Attorney in embassy bombings case). Former Federal

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[1] Pursuant to Rule 37.6, *amici curiae* (identified and described individually in Appendix), certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Bureau of Investigation lawyer Marion "Spike" Bowman was integrally involved in national security and terrorism-related investigations for over twenty years. James Benjamin, Jr., a former federal prosecutor, has co-authored a widely cited analysis of terrorism prosecutions in federal court. See Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

The diverse backgrounds and perspectives of *amici* have yielded two core commitments. First, the United States must combat terrorism within a framework shaped by the rule of law, including respect for both procedural safeguards and the independent advocacy that the First Amendment protects. Second, Congress, as long as it crafts legislation consistent with the rule of law, has authority under the Constitution to curb direct and indirect assistance to entities designated by the Secretary of State as foreign terrorist organizations (DFTOs). Congress's capability in this realm complements its more familiar power to restrict trade with state sponsors of terrorism or other hostile nations. See *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1148 (9th Cir. 2009) (hereinafter *HLP v. Treasury*) (upholding framework under International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (IEEPA)). *Amici* believe that the federal material support statute, 18 U.S.C. § 2339B, both protects constitutional rights and prevents DFTOs from gaming the system to obtain resources for violence.

SUMMARY OF ARGUMENT

In enacting 18 U.S.C. § 2339B, Congress made a policy choice to treat DFTOs much as the IEEPA treats state sponsors of terrorism or other hostile foreign powers. State sponsors of terrorism such as Iran share at least two dangerous attributes with DFTOs such as Al Qaeda, Hamas, and the Liberation Tigers of Tamil Eelam (LTTE): first, they have a track record of planning and executing violence abroad, where the United States cannot directly regulate their activities. Second, both DFTOs and state sponsors of terrorism exploit a portfolio of sources of direct and indirect assistance, including contributions of cash, goods, or services, to enhance their capacity for violence. See *HLP v. Treasury*, 578 F.3d at 1148. These activities complement illicit conduct such as money laundering designed to conceal the proceeds of crime. See *United States v. Aref*, 285 F. App'x 784 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1582 (2009) (Nos. 08-7650, 08-7651) (upholding conviction of defendant for money laundering scheme intended to furnish material support to terrorist activity).

As a result of these shared attributes, Congress found that DFTOs, like state sponsors of terrorism, "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247. By barring "material support" of DFTOs, § 2339B complements statutes such as the Anti-Terrorism Act and the IEEPA in disrupting DFTO operations "at [each] point along the causal chain of terrorism." See S. Rep. No. 102-342 (1992). Accepting the arguments of cross-petitioners Humanitarian Law Project, et al.

(hereinafter "petitioners") would undermine Congress's comprehensive framework for addressing the challenges posed by both DFTOs and state sponsors of terrorism.

The Constitution does not require this result. In ruling that § 2339B was vague as applied to petitioners, see *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 929 (9th Cir. 2009) (hereinafter *HLP v. Mukasey*), the court below failed to recognize that petitioners' position flows not from constitutional principle, but from a policy dispute with Congress. Petitioners make four critical mistakes. First, petitioners wrongly assert that § 2339B prohibits activities, such as independent advocacy, that the statute expressly permits. See 18 U.S.C. § 2339B(h). Second, they fail to acknowledge that the statute permits other activities, such as legal advice and representation, under a content-neutral license for which petitioners have failed to apply. See 31 C.F.R. § 597.505(a) (describing license); cf. *HLP v. Treasury*, 578 F.3d at 1151 (noting that petitioners have failed to apply for a license under the IEEPA). Third, petitioners fail to acknowledge that Congress can bar activities, such as assisting a DFTO with fundraising, that either directly or indirectly provide resources for violence. *Compare* Petitioners' Brief at 11 (arguing that First Amendment protects fundraising assistance), *with Regan v. Wald*, 468 U.S. 222, 242 (1984) (holding that under IEEPA Congress can prohibit both direct and indirect provision of resources to hostile foreign powers). Fourth, in claiming that the line between prohibited and permitted activities is vague, petitioners fail to acknowledge that Congress provided for exceptions such as those mentioned above whose contours are clear to a "person of ordinary intelligence." Cf. *HLP*

v. Treasury, 578 F.3d at 1146-48 (rejecting vagueness challenge to IEEPA).

Congress's comprehensive definition of material support, including the provision of "personnel," "service," "training," and "expert advice or assistance," see 18 U.S.C. §§ 2339A(b)(1)-(3), 2339B(h), reduces to a common denominator: concrete collaboration with a DFTO that enhances its ability to acquire resources and instrumentalities for violence. Congress sought to deprive DFTOs of both direct and indirect benefits, just as it had deprived state sponsors of terrorism of such benefits under the IEEPA. See *HLP v. Treasury*, 578 F.3d at 1148. To deprive DFTOs of direct benefits, Congress can bar not only cash contributions, as petitioners concede, see Petitioners' Brief at 17, but also services with a cash value. For example, since Congress can bar financial assistance to a DFTO, it can also bar petitioners from assisting a DFTO in obtaining cash contributions from others. The court below erred by failing to recognize the broad scope of Congress' authority to prohibit help to these organizations. See *HLP v. Mukasey*, 552 F.3d at 929 (suggesting that the First Amendment protected assistance to a DFTO in raising cash or obtaining goods with a cash value).

Congress found that contributions of goods and services have a fungible cash value, increasing resources available for violence. See *HLP v. Treasury*, 578 F.3d at 1148 (providing services to DFTOs "saves them money, which in turn increases the means at their disposal for terrorist acts"). In addition, Congress sought in both § 2339B and the IEEPA to curb indirect benefits to DFTOs, such as revenue generated by the travel of service providers. Hostile foreign powers and DFTOs can capture this revenue through taxing residents of territory under

their control. Under § 2339B, as under the IEEPA, Congress can regulate seemingly innocuous activities such as foreign travel that generate direct and indirect financial benefits for DFTOs. See *Emergency Coal. to Defend Educ. Travel v. United States Dep't of the Treasury*, 545 F.3d 4, 12-13 (D.C. Cir. 2008) (hereinafter *Emergency Coal.*) (upholding Congress's authority under IEEPA to regulate tourism in order to limit indirect financial benefits provided to hostile foreign powers).

Congress also crafted § 2339B to preserve constitutional values. Congress expressly instructed that the statute not "be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment." 18 U.S.C. § 2339B(i). Consistent with that requirement, the text of § 2339B expressly permits independent advocacy. See § 2339B(h) (exempting persons "who act entirely independently of the foreign terrorist organization to advance its goals or objectives"). The same language protects independent factfinding by journalists, academics, and human rights groups. *Id.* It also protects expressive association with a DFTO, defined as nominal allegiance with the group for purely expressive purposes. In addition, the statute's content-neutral licensing provision allows legal advice and representation. Cf. 31 C.F.R. § 597.505(a) (implementing statute).

The statute's bar on collaboration that directly or indirectly enhances a particular DFTO's resources for violence sets a clear boundary between prohibited and protected activities. Ruling on a related statute, the Ninth Circuit recently rejected a vagueness challenge to the IEEPA's prohibitions on "services" to DFTOs and state sponsors of terrorism. See *HLP v. Treasury*, 578 F.3d at 1146-48. The *HLP v. Treasury*

court recognized that a contrary holding would leave gaps in antiterrorism law enforcement and undermine Congress's power to exert leverage on hostile foreign powers. *Id.* The same danger would accompany a ruling for petitioners here. To avoid that risk, this Court should interpret § 2339B to bar collaboration with DFTOs beyond the exceptions already provided by Congress, and should uphold the constitutionality of the statute.

ARGUMENT

I. SOUND POLICY SUPPORTS CONGRESS'S VIEW OF THE FUNCTIONAL RELATIONSHIP BETWEEN A DFTO'S VIOLENT AND PUTATIVELY NONVIOLENT ACTIVITIES.

In enacting § 2399B, Congress recognized that DFTOs' violent and nonviolent activities have close functional ties. Petitioners claim that DFTOs can surgically separate violent and nonviolent tactics. See Petitioners' Brief at 17. However, the overwhelming weight of social science research and case law indicates that DFTOs structure their nonviolent activities to enhance their capacity for methodical campaigns of violence. Research amply supports Congress' view that DFTOs "are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct." AEDPA § 301(a)(7), 110 Stat. at 1247 (emphasis added).

In seeking to disrupt these synergies between violence and nonviolence, curbing financial contributions was Congress' most salient concern. However, Congress also recognized that a broad range of goods and services had cash value that provided direct or indirect benefits to DFTOs. Indeed, these intrinsically criminal enterprises could

readily evade a narrow prohibition on direct financial support. Because of the close links between DFTOs' violent and nonviolent activities, assistance involving goods and services also raises the risk of terrorist violence.

Section 2339B is part of a comprehensive scheme that Congress fashioned over a period of years to address the complex problem of transnational terrorism. This comprehensive scheme also includes the IEEPA[2] and 18 U.S.C. § 2339A, which bars material support provided with knowledge or intent that the support would facilitate various predicate crimes. Because § 2339A required proof that the defendant knew or intended that his or her actions would facilitate illegal conduct, it did not fully address the provision of money, equipment, or other services to DFTOs by those who knew of the organizations' aims and methods but lacked knowledge of specific criminal plans. To fill this gap, Congress enacted the instant statute in 1996. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 Harv. J. Legis. 1, 12-18 (2005).

Section 2339B embodied Congress's understanding that prohibitions on the means of violence, such as "explosives," would be ineffective without limits on the financial and human capital that facilitated violence. In the 1996 Act and subsequent amendments, Congress prohibited provision of "any property, tangible or intangible, or service," including "financial services," "personnel," "training," and "expert advice or assistance." 18 U.S.C. § 2339B. See generally Zabel & Benjamin, *supra* (analyzing recent

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[2] Courts have consistently upheld the constitutionality of the IEEPA. *See Regan v. Wald*, 468 U.S. 222 (1984).

prosecutions under §§ 2339A & B). Barring both direct and indirect financial benefits dovetails with Congress's goal in comprehensive antiterrorism legislation to "interrupt, or at least imperil, the flow of money... at any point along the causal chain of terrorism." See S. Rep. No. 102-342, at 22 (1992) (setting out rationale for providing civil remedies for victims of terrorism in the Anti-Terrorism Act, 18 U.S.C. § 2332 *et seq.*).[3]

A. Services Are Fungible And Possess A Cash Value That Confers A Benefit On DFTOs.

Congress's rationale for barring direct and indirect assistance follows from the risks posed by fungible financial contributions to DFTOs. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. Cal. 2000) (hereinafter *HLP v. Reno*) (support for putatively nonviolent programs "frees up resources that can be used for terrorist acts").[4] While

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[3] Money laundering by terrorist groups has become a focus of international, as well as domestic, concern. *See* Security Council Resolution 1373, U.N. Doc. S/RES/1373, § 1(d) (Sept. 28, 2001) (states are required to prohibit anyone within their personal or territorial jurisdiction from making any funds, resources or financial services available to persons who commit terrorist acts or to entities controlled by them); Fin. Action Task Force on Money Laundering, *Special Recommendations on Terrorist Financing* 1 (2004), http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf (noting importance of international cooperation).

[4] For further support on the fungibility issue, *see United States v. Afshari*, 426 F.3d 1150, 1160 (9th Cir. 2005) (because of fungibility, "donation of money could properly be viewed by the government as ... like the donation of bombs and ammunition"); *accord, Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc)

petitioners do not challenge the bar on providing cash to DFTOs, see Petitioners' Brief at 17, they ignore the fungibility of services with a cash value. Providing free services allows the DFTO to defray costs and shift resources to violence. See *HLP v. Treasury*, 578 F.3d at 1148 (providing services to DFTOs "saves them money, which in turn increases the means at their disposal for terrorist acts"). Recognizing the value of free services to a DFTO, one court recently observed that "[t]here is a fungibility to service for a terrorist organization just [as] there is fungibility to the funding of a terrorist organization." *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 168 (E.D.N.Y. 2008); see also *United States v. Afshari*, 2009 U.S. Dist. LEXIS 31585, at *18 (C.D. Cal. Apr. 14, 2009) (citing *Taleb-Jidi*); *United States v. Hashmi*, 2009 U.S. Dist. LEXIS108321, at *26-27 (S.D.N.Y. Nov. 18, 2009) (noting that distribution of goods to DFTO "would free up resources the group could then use in more violent expenditures").

Services also have an indirect cash value to DFTOs. Groups like those of the petitioners here often seek to engage in activities in foreign territory controlled by DFTOs. For example, teaching members of the Sri Lankan LTTE about applying for "humanitarian aid" could entail traveling to LTTE-occupied territory.[5] Such travel typically includes the incidental expenditure of funds within the territory for food, lodging, and transportation. When groups spend money in DFTO-controlled territory, DFTOs "take their cut" through taxing or tithing residents. See

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(hereinafter *Boim*), *cert. denied*, 130 S. Ct. 458 (2009); *Khan v. Holder*, 584 F.3d 773, 777 (9th Cir. 2009).

[5] Although, as petitioners note, Sri Lankan government forces recently defeated the LTTE, *see* Petitioners' Brief at 11 n.5, the group still has an international presence. *Id.*

Matthew Levitt, *Hamas: Politics, Charity, and Terrorism in the Services of Jihad* 61-63 (2006) (discussing use of tithing to generate revenue for DFTO); Luz Estella Nagle, *Global Terrorism in Our Own Backyard: Colombia's Legal War Against Illegal Armed Groups*, 15 Transnat'l L. & Contemp. Probs. 5, 15 (2005) (discussing taxes imposed by the Revolutionary Armed Forces (FARC), a Colombian DFTO involved with narcotics trafficking); cf. *Emergency Coal.*, 545 F.3d at 12-13 (upholding travel restrictions under IEEPA to curb indirect benefits to hostile powers).

B. Compounding The Fungibility Problem, Terrorist Funding Is Often Off The Books.

Many terrorist groups' disdain for general accounting principles compounds the fungibility problem. In the absence of accounting safeguards, terrorist groups can use money slated for a nonviolent activity to support violence. See *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004) (commenting that "terrorist organizations can hardly be counted on to keep careful bookkeeping records"); *HLP v. Reno*, 205 F.3d at 1136 ("terrorist organizations do not maintain open books"); *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (en banc) (citing *HLP v. Reno* discussion of terrorist accounting methods in holding that proof of specific intent is not required for criminal conviction based on defendant's financial contribution to Hizballah), *vacated on other grounds*, 543 U.S. 1097 (2005).

C. Material Support Of DFTOs' Social Service Programs Serves As An Incentive For Terror.

DFTOs also use putatively nonviolent programs to enhance incentives for terrorist activity. For example, a terrorist group may use contributions supposedly earmarked for "peaceful purposes" to aid the families of suicide bombers, "thus making the decision to engage in terrorism more attractive." See *HLP v. Reno*, 205 F.3d at 1136; *Boim*, 549 F.3d at 698 (DFTO's "social welfare activities reinforce its terrorist activities ... by providing economic assistance to the families of ... fighters"); *Linde v. Arab Bank PLC*, 384 F. Supp. 2d 571, 585 (E.D.N.Y. 2005) (targeted payments to families of suicide bombers constitute "incentive" to terrorist acts); cf. Jerrold M. Post, Ehud Sprinznak & Laurita M. Denny, *Terrorists in Their Own Words: Interviews with 35 Incarcerated Middle Eastern Terrorists*, 15 Terrorism & Pol. Violence 171, 177 (2003) (quoting jailed terrorist as noting that "families of terrorists who were wounded, killed, or captured enjoyed a great deal of economic aid and attention ... families got a great deal of material assistance, including the construction of new homes"). The provision of social services increases community assistance for *all* aspects of a group's operation, including violent attacks. See Justin Magouirk, *The Nefarious Helping Hand: Anti-Corruption Campaigns, Social Services Provisions, and Terrorism*, 20 Terrorism & Pol. Violence 356, 365 (2008). By pairing institutionalized social services and force, DFTOs seek to both subvert and supplant the state, obliging the United States and its allies to devote more resources to bolstering legitimate state authority.

D. Nonviolent Programs Aid Terrorist Recruitment And Retention.

Contributions to putatively nonviolent programs, such as schools and mosques run by terrorist groups, also underwrite indoctrination and recruitment into violence. See *Boim*, 549 F.3d at 698 (Hamas's "social welfare activities reinforce its terrorist activities ... [by] providing funds for indoctrinating school-children"); Levitt, *supra*, at 135 (noting links between Hamas-affiliated cleric preaching violence and individual inspired by cleric to "scout potential sites for suicide bombings in Jerusalem"); Post et al., *supra*, at 173 (50 percent of jailed terrorists interviewed by authors cited experience at a mosque or other religious influence as "central"). The provision of public goods such as education, health services, and welfare by terrorist groups also deters defection, since a defector and his family lose entitlement to the public goods. See generally *Boim*, 549 F.3d at 698 (noting that Hamas's social service programs "mak[e] it more costly ... to defect"); Eli Berman & David D. Laitin, Nat'l Bureau of Econ. Research, Working Paper 13725, *Religion, Terrorism, and Public Goods: Testing the Club Model* 3 & n. 5, 4, 24 (2008) (same); see also Magouirk, *supra*, at 358 (discussing Hamas' provision of social services).

E. Putative Social Service Programs Also Assist DFTOs In Laundering Revenue Obtained Through Illicit Activities.

DFTOs such as the LTTE rely on money from drug trafficking and other illicit activities. See Phil Williams, *Terrorist financing and organized crime: nexus, appropriation, or transformation?*, *in Countering the Financing of Terrorism* 126, 138-39 (Thomas J. Biersteker & Sue E. Eckert eds., 2008) (detailing the involvement of LTTE in criminal

conduct, including heroin trade, human trafficking, gun-running, and extortion). DFTOs need to conceal the origins of the cash obtained through crime. Charitable activities are a convenient vessel for DFTOs' money laundering.

Scholars have noted the pervasive reliance of DFTOs on illicit activity. See Bruce Hoffman, *Inside Terrorism* 27-28 (1998) (noting "strategic alliances" between organized crime and terrorist groups); Ahmed Rashid, *Taliban* 117-18 (2001) (describing Taliban's reliance on revenue from opium trade); Marc Sageman, *Understanding Terror Networks* 82 (2004) (discussing religiously approved involvement of terrorist operatives in "petty crime" which helps fund terrorist groups). In Colombia, the FARC has become what researchers call a "commercial insurgency," Williams, *supra*, at 132, turning to drug trafficking to gain substantial revenue. *Id.*; see also Audrey Kurth Cronin et al., *Foreign Terrorist Organizations* 92 (Cong. Research Serv. Feb. 6, 2004) (discussing FARC's reliance on drug trafficking); Thomas J. Sanderson, *Transnational Terror and Organized Crime: Blurring the Lines*, 24 SAIS Rev. 49, 51 (2004) (same). FARC also taxes other players in the drug trade in areas which it controls. See Williams, *supra*, at 132. Hamas has been involved in a spectrum of illegal activities, including drug trafficking and credit card fraud. See Levitt, *supra*, at 70-73; see also Sanderson, *supra*, at 54 (discussing Hamas and Hizballah involvement in drug trafficking in tri-border region of Argentina, Brazil, and Paraguay). In addition to the drug trade, Hizballah has sought to skim money from illegal cigarette sales in the United States. See *Hammoud*, 381 F.3d at 325-26.

DFTOs' involvement in putative philanthropy aids in laundering the proceeds of such illicit activities. See John Roth, Douglas Greenberg & Serena Wille, Nat'l Comm'n on Terrorist Attacks on the U.S., *Monograph on Terrorist Financing* 21-22 (2004) (9/11 Comm'n), *available at* http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf (analyzing role of charities in funding Al Qaeda); Council On Foreign Relations, *Terrorist Financing* 12 (2002) (noting that DFTOs collaborate on strategies for money laundering); *cf.* Levitt, *supra*, at 70-73 (noting Hamas' reliance on money laundering techniques). Charities perform a double purpose: DFTOs can disguise the proceeds of illicit activities as charitable contributions, and can then conceal funding for allies and operatives of the DFTO as payments for charitable services. *Cf.* Antiterrorism Act of 1990, Hearing Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary, 101st Cong. 79 (1990) (Statement of Joseph Morris) ("[a]nything that could be done to deter ... money-laundering in the United States ... would also help deter terrorism").

To enhance their prospects for money laundering and financial manipulation, both DFTOs and state sponsors of terrorism also seek to establish front groups within the United States. Nonprofit foundations in this category acquire revenue and assets for the benefit of the DFTO or state sponsor of terrorism. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162-63 (D.C. Cir. 2003) (finding that Hamas had beneficial interest in assets and revenue of foundation; proof of such interest supported order blocking foundation's assets); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 753-54 (7th Cir. 2002) (holding that terrorist group's

beneficial interest in foundation assets would support order freezing assets); see also Michael Birnbaum, *U.S. targets landlord of Md. Islamic center; Authorities suspect property's owner has ties to Iran government*, Wash. Post, Nov. 14, 2009, at B1 (reporting on government's initiation of forfeiture proceedings regarding valuable assets allegedly held by nonprofit group as a front for Iran). Certain nonviolent activities such as providing instruction to members of a DFTO can furnish a convenient façade for the establishment of domestic organizations in which DFTOs hold beneficial interests. Cf. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 71-73 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003) (substantial evidence supported government's finding that foundation misrepresented aid to families of suicide bombers).

F. Summary.

Case law and social science research vindicate Congress's view that both cash and in-kind contributions for social services enhance DFTOs' ability to engage in violence. Curbing cash contributions removes a central building block in the architecture of terror. Regulating in-kind contributions of goods and services that DFTOs can cash out directly or indirectly reinforces the bar on cash transfers and bolsters Congress's comprehensive antiterrorism framework.

II. BECAUSE OF THE FUNCTIONAL RELATIONSHIP BETWEEN A DFTO'S VIOLENT AND PUTATIVELY NONVIOLENT ACTIVITIES, CONGRESS CAN LEGISLATE BROADLY TO CURB THE DIRECT AND INDIRECT PROVISION OF RESOURCES TO A DFTO.

Congress can legislate comprehensively to deprive foreign terrorist group of resources. As courts have repeatedly recognized, the difficulties of regulating terrorist violence abroad and the interaction of a DFTO's violent and nonviolent activities allow Congress to employ prophylactic measures which take broad aim at the problem. See *HLP v. Treasury*, 578 F.3d at 1146. Interpreting the IEEPA's related comprehensive scheme, the Ninth Circuit has recently held that with certain exceptions required by the Constitution, Congress can bar an individual or entity from "perform[ing] a useful professional or business task for a terrorist organization." See *id.* In seeking to disrupt transnational terrorism, Congress need not require a showing that each and every instance of service delivery directly facilitates violence. Rather, Congress, having provided for clear and limited exceptions, may bar categories of material support conferring both direct and indirect benefits on DFTOs. Indeed, the difficulties of obtaining and acting on information abroad would make more finely-grained classifications unworkable.[6] To fulfill its goal of shutting off the flow of

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[6] Courts have invoked an analogous rationale in upholding the statute's bar on direct cash contributions. *See HLP v. Reno*, 205 F.3d at 1136-38. *Cf.* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 Geo. Immigr. L.J. 313, 331 (2000) (justifying prophylactic regulation on grounds that United States "has

money and resources to DFTOs, Congress has taken this broad approach under § 2339B.

A. Congress Used The Prohibitions On "Training" And "Expert Advice Or Assistance" To Bar Concrete Collaboration That Results In Direct Benefits To The DFTO.

The statutory definitions of "training" as the teaching of a "specific skill," 18 U.S.C. § 2339A(b)(2), and "expert advice or assistance" as "scientific, technical or other specialized knowledge," see *id.* at (b)(3), target collaboration with a DFTO that confers a direct benefit on the group's ability to marshal resources for violence. "Training" foreign terrorists in a "specific skill" they previously lacked involves concrete collaboration with a DFTO that enhances the DFTO's structure, operation, and resources. "Expert advice or assistance" is "specialized" since it entails advanced knowledge that is "foreign" to a layperson's experience, see *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148-49 (1999) (defining expert testimony), and therefore provides a benefit to the DFTO that would otherwise be unavailable.

The link between concrete collaboration and the danger posed by DFTOs is most obvious in training regarding instrumentalities of violence. See *United States v. Kassir*, 2009 U.S. Dist. LEXIS 83075, at *22 (S.D.N.Y. Sept. 11, 2009) (upholding the defendant's conviction for providing training to individuals on how to modify an AK-47 to fire grenades). However,

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limited ability to enforce anti-terrorist legislation against foreign organizations that are based in countries with which the United States has amicable relations, and even less ability to enforce it against organizations that are based in hostile countries").

the provision of expert judgment in other realms also has a cash value that can aid terrorist groups. Just as a DFTO can use currency to buy explosives, it can use expert advice to fine-tune its funding mechanisms, cost structure, and capacity for violence. For example, a construction expert who teaches Hamas how to build an indoctrination center for youth more cheaply also allows the group to shift more resources from such services to violent activities. To counteract this risk, the statutory scheme allows only limited avenues for providing expert judgment, and requires that lawyers and others wishing to provide such help obtain a license from the Treasury Department. See Point III.C, *infra*.

Much of the conduct in which petitioners seek to engage would furnish direct assistance to a DFTO's financing or violent capabilities. Consider, for example, petitioners' desire to teach members of the LTTE how to obtain tsunami-related aid from international bodies. See Petitioners' Brief at 11. The court below viewed this as a harmless philanthropic act. See *HLP v. Mukasey*, 552 F.3d at 929. However, given the link that Congress identified between a DFTO's violent and nonviolent conduct, tsunami aid presents bountiful opportunities for siphoning off money intended for disaster response, punishing and extorting internal opponents through the allocation of such aid, and laundering proceeds of illicit activity. See, *e.g.*, Sumathi Reddy, *Sri Lanka conflict finds its way into aid efforts; Groups filled with distrust compete for donations*, Balt. Sun, Jan. 18, 2005, at 5A (noting concerns that LTTE, which has often targeted moderate Tamils for murder, will divert aid intended for tsunami victims); cf. Lorna McGregor, *Beyond the Time and Space of Peace Talks: Re-Appropriating the*

Peace Process in Sri Lanka, 11 Int'l J. Peace Stud. 39, 45 (2006) (noting that as of 2006, LTTE continued to "assassinate its political opponents, extort taxes, recruit children into its forces, [and] attack the Muslim community within the territory it controls"); Erica Chenoweth et al., *Correspondence: What Makes Terrorists Tick*, 33 Int'l Sec. 180, 185 (2009) (noting that LTTE has striven for dominance among Tamils through killing of members of rival Tamil factions); Peter Popham, *Tamil Tigers Break UN Pledge on Child Soldiers*, The Independent (London), Feb. 4, 2000, at 18 (reporting that LTTE only allowed families to receive humanitarian aid if "one or more family members perform a service," including service as a child soldier). Once the LTTE receives tsunami aid, there are few constraints on how it actually spends the cash. The Constitution does not make trust in a DFTO Congress's sole policy option.[7]

Just as "there is no constitutional right to fund terrorism," see *Holy Land Found. for Relief & Dev*, 333 F.3d at 165, there is no constitutional right to assist terrorists in securing funding. Indeed, the court below seemed to entertain second thoughts

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[7] Admittedly, Congress's policy choices under both the IEEPA and § 2339B entail trade-offs, as do virtually all decisions in the complex domain of foreign affairs. For example, Congress authorized federal agencies to permit private groups to provide aid to victims of humanitarian crises. See 31 C.F.R. § 501.801(c) (authorizing granting of licenses to nongovernmental organizations supplying aid "for the purpose of relieving human suffering"). In reviewing such groups' plans to ensure that a DFTO controlling the territory does not benefit, a government agency may move more deliberately than some would wish. Congress made the policy choice that such deliberation presents fewer risks than trusting in the diligence of DFTOs. While this policy choice may be incorrect, it is surely one that the Constitution reserves to Congress.

about according fundraising assistance First Amendment protection, cautioning that § 2339B might not be vague when applied to a service that "resulted in the receipt of money by the [DFTO] itself." *HLP v. Mukasey*, 552 F.3d at 930 n.8. The court below was wrong, however, in assuming that the Constitution requires individualized proof of the nexus between a particular service and the DFTO's financial advantage. Rather, under the Constitution, as the Ninth Circuit has recognized in a related case, Congress may legislate prophylactically, by barring performance of any "useful professional or business task for a terrorist organization." See *HLP v. Treasury*, 578 F.3d at 1146.

Congress can legislate broadly to prevent other concrete collaborations that confer a direct benefit on a foreign terrorist organization. For example, consider petitioners' wish to teach political geography to a DFTO. See Petitioners' Brief at 27. Petitioners think it unreasonable that Congress's bar on training in specific skills would prohibit an instructor from responding to DFTO members' questions regarding the particular activities of the group. See *id.* at 27-28. Yet this result is neither unreasonable nor surprising, given the contours of the topic. Political geographers have provided detailed analyses of the techniques used by terrorist groups to select the tools and targets of violence. See Timothy W. Luke, *Postmodern Geopolitics: The Case of the 9.11 Attacks*, *in*, *A Companion to Political Geography* 219, 221 (John Agnew, Kathryne Mitchell & Gerald Toal eds., 2003) (noting that "Lethal capabilities can be created simply by [reconfiguring] everyday uses ... [including] agricultural fertilizers [and] rental trucks"). As it must under the First Amendment, the statute permits a researcher to contact DFTOs for factfinding

purposes and publish his or her analysis. See Point III, *infra*. However, a DFTO's sponsorship of a question and answer session with a researcher on terrorist capabilities would likely entail more than mere distribution of the researcher's findings. Interlocutors at a DFTO-sponsored question and answer session would likely also exploit the political geographer's expert judgment on how that particular group can most efficiently locate infrastructure such as safe-houses, tunnels, and bomb-making sites. Congress can bar the provision of such concrete instruction to foreign terrorist groups.

To curb a DFTO's capability to inflict violence, Congress can also prohibit expert advice or assistance derived from "scientific" or "technical" knowledge. See 18 U.S.C. § 2339A(b)(3). Under this prohibition, an individual could not share with a DFTO or its members written material about nuclear physics, even if the material did not include concrete guidance on how to build a nuclear weapon. Congress clearly believed that even the provision of general material on physics, chemistry, biology, and engineering would facilitate a DFTO's development of means of violence. Here, too, Congress has the power to legislate broadly to achieve its objective.

B. Congress Can Also Bar Services That Indirectly Bolster Terrorist Financing

To supplement the curb on direct assistance, Congress can bar the performance of tasks that confer an indirect benefit on a DFTO's financing capabilities. This Court has recognized that Congress may enact a comprehensive bar on travel to or trade with countries, such as state sponsors of terror, that pose a risk to the United States. See *Regan v. Wald*, 468 U.S. 222, 242 (1984); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). In such cases, Congress

has often focused not merely on direct assistance to foreign powers that pose a danger, but also on curbing the indirect financial advantages that foreign powers can reap from seemingly harmless activities such as tourism. See, *e.g.*, *Emergency Coal.*, 545 F.3d at 12-13 (describing tourism as "critical and much-exploited revenue source" for foreign government deemed hostile to American foreign policy interests). The Constitution grants Congress this power to provide leverage in negotiations with hostile nations. *Id.* If Congress can regulate tourism, it can surely regulate activities with similar indirect benefits that flow from concrete collaboration with DFTOs.

In order to bar both state sponsors of terror and DFTOs from reaping these indirect benefits, Congress has the constitutional authority to prohibit concrete collaboration with such entities. Petitioners maintain that teaching foreign nationals overseas is "pure speech," immune from regulation. See Petitioners' Brief at 11, 17. However, courts have repeatedly recognized Congress' power to curb indirect benefits to hostile regimes by regulating instruction overseas. See *Emergency Coal.*, 545 F.3d at 12-13.

Consider teaching English in a Hamas-controlled school. If the class involves adult Hamas operatives, English instruction can help such operatives conceal their identity and gain entrance to territory that they cannot lawfully enter, including the United States. Cf. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(i)(V (excluding members of DFTOs). Second, an English teacher who becomes part of the DFTO's larger social service apparatus helps bond residents to the organization's campaign of violence, making them dependent on the DFTO's largesse. See *Boim*, 549 F.3d at 698. Third, an entity that offers to *donate* English-teaching services saves the DFTO

resources, which it is free to apply to the instrumentalities of violence. As the Ninth Circuit recently observed in upholding the related IEEPA scheme, providing services to DFTOs "saves them money, which in turn increases the means at their disposal for terrorist acts." See *HLP v. Treasury*, 578 F.3d at 1148. Fourth, a teacher from the United States spends dollars in the Hamas-controlled economy, which Hamas can tax, just as hostile regimes tax tourist dollars limited under the IEEPA. Finally, Hamas can also mask expenditures for violence by inflating ancillary spending required for the teacher's support. Congress can legislate to deprive DFTOs of each of these benefits.

III. SECTION 2339B CLEARLY PERMITS INDEPENDENT ADVOCACY AND OTHER PROTECTED SPEECH

Congress's comprehensive framework also permits a number of activities in which petitioners seek to engage. The statute's text and regulations allow independent advocacy and factfinding, expressive membership, and legal advice and representation. These safe harbors reflect Congress' intent that the statutory scheme not "be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment." 18 U.S.C. § 2339B(i). The clear exceptions for constitutional rights that Congress built into the statute's coverage also expose the hyperbole in petitioners' parade of horribles.

A. The Statute Permits Independent Advocacy.

The statute's terms clearly permit independent advocacy, regardless of content. For example, the statute poses no obstacle to petitioners' wish to argue for goals supported by the LTTE and other DFTOs.

Contrary to petitioners' contention, see Petitioners' Brief at 24-25, Congress expressly crafted § 2339B to protect such "pure speech." Subsection (h) exempts from coverage "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives." Under the statute, such individuals do not act under the DFTO's "direction or control." 18 U.S.C. § 2339B(h). Indeed, the Ninth Circuit has relied on the government's recognition that the related IEEPA scheme does not bar independent advocacy. See *HLP v. Treasury*, 578 F.3d at 1147 (citing 72 Fed. Reg. 4206 (Jan. 30, 2007)) (criteria for designating individuals and entities as transnational terrorists will be applied in a content-neutral manner consistent with the First Amendment).

B. The Statute Permits Independent Fact-finding.

Just as the statute clearly exempts independent advocacy, it also exempts independent fact-finding. Individuals or entities such as academics, journalists, or human rights organizations contact members of a DFTO in the course of their important work. Given Congress' intent to accommodate First Amendment concerns and the well-known canon counseling avoidance of constitutional problems, see *Crowell v. Benson*, 285 U.S. 22, 60-61 (1932), independent fact-finders would clearly not be acting under the "direction or control" of the DFTO within the meaning of the statute.[8] Moreover, by virtue of their

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[8] On similar reasoning, the statute permits expressive membership, defined as an individual's purely nominal affiliation with an organization for the purpose of stating his or her agreement with the group's objectives. Since the First Amendment would protect such an expression of allegiance, and

independence, such groups serve the public generally; under the statute, therefore, they do not provide services "to" a DFTO. For similar reasons, the statute's coverage does not extend to the activities of impartial and independent global mediators such as the Carter Center.

C. The Statute Permits Legal Advice And Representation Subject To A Content-Neutral Licensing Process.

The statutory scheme would also permit petitioners to provide legal advice and representation under a content-neutral licensing procedure. For example, petitioners wish to provide training in general principles of international law to members of the LTTE and another DFTO, and offer assistance in peace negotiations. Petitioners' Brief at 10-11. Regulations allow an attorney to provide advice to a DFTO on compliance with applicable United States law. See 31 C.F.R. § 597.505(a). Since international law is "part of our law" for this purpose, see *The Paquete Habana*, 175 U.S. 677, 700 (1900), the regulations clearly would allow petitioners to obtain a license to perform such tasks. A license to provide legal services would extend to representation of a DFTO in United States legal proceedings, including the filing of *amicus* briefs. See 31 C.F.R. § 597.505(c), (d).[9]

Congress expressly stated its intent to legislate consistently with free speech guarantees, courts should read the statute's definition of "personnel," *see* 18 U.S.C. § 2339B(h), to exclude expressive membership.

[9] The government was incorrect in arguing below that submitting an *amicus* brief on a DFTO's behalf would be prohibited "expert advice or assistance" under the statute. *See HLP v. Mukasey*, 552 F.3d at 930. *Amici* believe that a content-neutral licensing scheme for legal advice and representation

The licensing framework requires that petitioners provide training on international law through an attorney. However, this requirement hardly renders the statutory framework constitutionally infirm. Limiting the provision of legal advice to lawyers is consistent with state regulation governing professional services. See *In re New Hampshire Disabilities Rights Ctr., Inc.*, 541 A.2d 208, 213-14 (N.H. 1988) (Souter, J.) (ruling that United States Constitution requires leeway for nonprofit organization providing legal services, while assuming that only lawyers would provide such services); see generally *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998) (interpreting California Business and Professions Code § 6125, which states that, "No person shall practice law in California unless the person is an active member of the State Bar."). Moreover, attorneys must comply with professional rules, such as refraining from counseling or assisting in unlawful activity, that provide an additional check on a DFTO's ability to mask material support as permissible assistance. See Am. Bar Ass'n, *Model Rules of Professional Conduct*, R. 1.2(d) (2009). Since the Constitution permits such regulation in the domestic realm, it would be anomalous to subject regulation of DFTOs to a more exacting standard.

Requiring a license for services that directly or indirectly benefit a foreign entity is constitutional, as

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including the filing of *amicus* briefs – is included within the statutory framework and may well be constitutionally required. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543-49 (2001) (striking down content-based restriction on assistance provided by government-funded attorneys); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (noting First Amendment interest in provision of legal assistance in civil rights matters).

long as the criteria for licensing are content-neutral, further an important governmental objective, and are tailored to achieve that goal. See *Emergency Coal.*, 545 F.3d at 12-13 (upholding IEEPA regulations regarding travel to Cuba as imposing merely incidental burden on free speech); see generally *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (outlining standard for incidental restrictions on speech). The framework adopted by Congress easily meets these criteria. However, petitioners have failed to take "Yes" for an answer, since they have apparently never sought a license under the statute. Cf. *HLP v. Treasury*, 578 F.3d at 1151 (noting that petitioners never sought a license under the IEEPA, and therefore lacked standing to challenge licensing process).

IV. BECAUSE § 2339B PROHIBITS ONLY CONCRETE COLLABORATION WITH A DFTO, IT IS NOT UNCONSTITUTIONALLY VAGUE

Because § 2339B permits the activities outlined above and forbids only concrete collaboration with a DFTO, the prohibition on providing material support to terrorist organizations is not unconstitutionally vague. Vagueness doctrine requires that the statute set a boundary between lawful and unlawful conduct that is discernible by a "person of ordinary intelligence." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Section 2339B meets this standard, as the actions of petitioners demonstrate.

Interpreted to both bar concrete collaboration and permit under license the exceptions described, the statute tracks the IEEPA scheme recently upheld by the Ninth Circuit. See *HLP v. Treasury*, 578 F.3d at 1146-48. As the Ninth Circuit suggested, the IEEPA scheme, which also includes a bar on providing

services without a license, is broad. *Id.* However, as the Ninth Circuit emphasized in *HLP v. Treasury*, a statute that is broad can also be quite clear in practice.

Interpreting the terms "specific skill" and "specialized knowledge" in the statute's respective definitions of "training" and "expert advice or assistance" as entailing concrete collaboration retains both the statute's breadth and its clarity. This interpretation focuses on the nature and function of the relationship between the provider of material support and the DFTO. When the relationship is interactive and could result directly or indirectly in the DFTO's acquisition of resources, the statute prohibits it, unless it is performed under license. When a person acts independently of a DTFO and provides it with no resources, the statute simply does not come into play. This line is clear and readily apparent from the statute's text.

A similar test applies to the statutory term, "service." Using a comparable definition under the related IEEPA framework, a court viewed "service" as "by and large, a word of common understanding and one that could not be used for selective or subjective enforcement." See *Humanitarian Law Project v. U.S. Dep't of Treasury*, 463 F. Supp. 2d 1049, 1063 (C.D. Ca. 2006), *aff'd*, 578 F.3d 1133 (9th Cir. 2009); see also *Al Haramain Islamic Found., Inc. v. United States*, 2009 U.S. Dist. LEXIS 103373, at *50 (D. Ore. Nov. 5, 2009) (finding no vagueness in 31 C.F.R. § 594.406(b), which bars unlicensed provision of "'legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other services'"). A person of ordinary intelligence and prudence would understand that § 2339B bars collaborative instruction but permits

independent advocacy, conducting independent research on the group, or providing legal services authorized under license. The Constitution does not require greater precision. See *Grayned*, 408 U.S. at 110 (given the limits of language, vagueness doctrine does not require specification to a "mathematical certainty").

The statute's definition of "personnel" as including those serving under the "direction or control" of the DFTO is also clear, as the court below found. See *HLP v. Mukasey*, 552 F.3d at 931. As the court observed, Congress's use of the terms "direction or control" excludes independent advocacy from the statute's ambit. *Id.* These terms restrict coverage to the provision of individuals ready to obey the DFTO's orders, which might entail violence or other illegal conduct. The court below found that Congress's express exclusion of "entirely independent" activity made its intent clear. *Id.* Petitioners argue that Congress' exclusion of "'entirely independent'" activity requires individuals to guess whether *any* contacts with a DFTO are permissible. Petitioners' Brief at 36. However, this argument reads entirely too much into the word, "entirely." The word's placement in the statute, together with Congress's express intent to avoid First Amendment problems, demonstrates that Congress did not seek to regulate the *number* of an individual's contacts with the DFTO. Rather, as in the interpretation of the terms "specific" and "specialized" elsewhere in the statute, Congress sought to regulate the *nature and function* of the relationship with the terrorist group. On this view, the phrase "entirely independent" merely highlights the prohibition of a particularly dangerous concrete collaboration: linking current DFTO operatives with individuals ready to do the DFTO's

bidding.[10] A person of ordinary intelligence can readily ascertain the difference between merely having contact with a DTFO and submitting to its direction or control, and can conform his or her conduct accordingly.

The statute is also clear in its classification of "scientific" or "technical" knowledge as "expert advice or assistance." See 18 U.S.C. § 2339A(b)(3). As the court below recognized in ruling against petitioners on this point, the words "scientific" and "technical" have a clear and accepted meaning "reasonably understandable to a person of ordinary intelligence." See *HLP v. Mukasey*, 552 F.3d at 930. A person of ordinary intelligence would understand that Congress sought to curb a DFTO's access to specialized knowledge that would aid the development or refinement of means of violence. To conform her conduct to legal requirements, such a person would avoid knowingly furnishing a DFTO specialized knowledge of fields such as physics, chemistry, biology, or engineering, even outside an interactive classroom setting. This requirement is broad, but hardly vague.

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[10] Because the statute does not regulate either independent advocacy or the number of contacts with a DFTO, petitioners are incorrect that it punishes mere association. *See* Petitioners' Brief at 56-57. Rather, as the court below noted, the statute prohibits knowing conduct: the provision of material support with knowledge that the group was a DFTO, or is presently or has engaged in terrorist activities or terrorism. *See HLP v. Mukasey*, 552 F.3d at 926; *see also Yates v. United States*, 354 U.S. 298, 330 n.36 (1957) (noting that Constitution bars conviction based on mere association divorced from conduct), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978).

Petitioners' argument for vagueness, in contrast, rests on two shaky pillars: 1) the assertion that a bar on "specific" training necessarily entails parsing terms of degree, and, 2) opposition to the breadth of the statute. Petitioners seek to characterize the statutory language as embodying "'terms of degree,'" Petitioners' Brief at 27, which they argue are inherently vague. However, the statute addresses differences of kind, not degree, through a functional inquiry into the relationship between the provider of material support and the DFTO. Ultimately, as the Ninth Circuit recently observed, petitioners' fundamental complaint is with the statute's breadth. *HLP v. Treasury*, 578 F.3d at 1148. The *HLP v. Treasury* court held that the IEEPA's comprehensive framework, echoed by § 2399B, did not present vagueness problems. *Id.* at 1146-48. Indeed, as the Ninth Circuit observed, the guidance provided by the comprehensiveness of the statute decisively countered vagueness concerns: a person of ordinary intelligence knows that, with very limited exceptions, it is illegal to engage in any kind of concrete collaboration with, or provide concrete help or support to, a terrorist group. That, too, is a broad injunction, but it is not vague.

Acknowledging Congress' power to enact broad prohibitions also rebuts petitioners' argument that the statute's terms are contradictory. See Petitioners' Brief at 39. Petitioners state correctly that § 2339B(b)(3) defines "expert advice or assistance" as including "scientific ... [or] technical knowledge." Thus defined, this term may cover conduct not addressed by another statutory term, such as "training." See 18 U.S.C. § 2339A(b)(2) (defining "training" as "instruction ... designed to impart a specific skill"). For example, the prohibition in

§ 2339A(b)(3) on sharing "scientific [or] technical ... knowledge" would bar an individual from imparting knowledge of general principles of nuclear physics to a DFTO or its members. The prohibition on "training," which bars interactive teaching about specific matters related to the DFTO, would not cover provision of the general material about nuclear physics. See generally Petitioners' Brief at 39. However, this difference in coverage does not render the statute's terms contradictory. In enacting a criminal statute, Congress is free to craft separate terms that reach a range of conduct that it views as dangerous. Such terms are not conflicting, but complementary. See *Rubin v. Garvin*, 544 F.3d 461, 469 (2d Cir. 2008). Congress clearly believed that providing a DFTO even with general texts on physics, chemistry, biology, or engineering would pose an unacceptable risk. The Constitution does not preclude Congress from making this policy choice.

Despite their vagueness arguments, a clear look at the actual practice of petitioners and *amici* supporting their position demonstrates the ease of compliance with the statute's terms. On its web site, petitioner Humanitarian Law Project (HLP) has readily distinguished between independent advocacy and conduct barred by the statute. Comments featured on the site urge the Sri Lankan government to consult with the LTTE and include "Tamil ... military forces" in negotiations.[11] HLP's stance demonstrates that the statute has not chilled independent advocacy. Similarly, Human Rights Watch has produced many reports documenting

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[11] *See* Comm'n on Human Rights, United Nations, *Statement of the International Educational Development*, *available at* http://hlp.home.igc.org/docs/Sri_Lanka_Statement.htm (last visited Dec. 22, 2009).

human rights concerns about the Sri Lankan conflict. See, *e.g.*, Human Rights Watch, Sri Lanka Under Siege (Jan. 19, 2009), http://www.hrw.org/en/news/2009/01/29/sri-lanka-under-siege (discussing latest effects of conflict between LTTE and government). The statute has evidently not deterred Human Rights Watch from performing its independent factfinding role. Despite petitioners' claims, nonprofit organizations regularly engage in independent advocacy and factfinding, and avoid the concrete collaboration that the statute forbids.

In the final analysis, petitioners' quarrel is not with the clarity of the statute's commands, but with the congressional policy judgment underlying the statute's comprehensive framework. That framework already includes clear exceptions for independent advocacy and fact-finding, expressive membership, and properly licensed legal advice. Vagueness doctrine does not require more elaborate distinctions. This Court should decline petitioners' invitation to use vagueness doctrine as a vehicle for second-guessing Congress's policy choices in the complex realm of foreign affairs.

CONCLUSION

This Court should affirm those portions of the decision below which upheld the statutory bars on provision of "personnel" and "expert advice or assistance" involving "scientific" and "technical" knowledge. It should reverse the holding below striking down as unconstitutionally vague the prohibitions on providing "training," "expert advice or assistance" in the form of "specialized" knowledge, and "service" to a DFTO.

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